Supreme Court, U.S.
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No. 09-312

In The

Supreme Court of the United States

CLIFF GREENE,

Petitioner,

v.

HANOVER DIRECT, INC., et al.; WILLIAM B. WACHTEL, Chairman of the Board of Directors, and Chairman of the Nominating Committee; WAYNE P. GARTEN, Chief Executive Officer, President and Director; STUART FELDMAN, Chairman of the Executive Committee and a member of the Compensation Committee and Director,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A REHEARING

CLIFF GREENE, *Pro Se*
1333 President Street
Brooklyn, New York 11213
(718) 493-7028

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Comes now Petitioner Cliff Greene, Pro Se, and submits the following compelling reasons in support of his Petition for a Rehearing.

THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

1. The cause of action upon which the United States District Court for the Southern District of New York based its final rulings, granting Defendants-Appellees' motion to dismiss the complaint, and same, affirmed by *United States Court of Appeals for the Second* Circuit, are not only contrary to the cause of action upon which the case, the complaint, was brought to the District Court by Petitioner, but, has so far departed from the accepted and usual course of judicial proceedings, that this court should allow Petitioners' Petition for a Rehearing.

2. The accepted and usual course of judicial proceedings are to base final rulings or judgment on cause or causes of action brought to the court in the complaint by Petitioner and the allegations made therein. Therefore, since the judgment of the District Court and the affirmation of same by Second Circuit were not based on the complaint and allegations made therein by Petitioner, this Court should allow Petitioners' Petition for a Rehearing.

REASONS FOR ALLOWANCE OF PETITION FOR A REHEARING

1. Memorandum and Order dated New York 11-19-2007, date filed 11-21-2007, same, granted Defendants' Motion to Dismiss the Complaint in its Entirety with Prejudice, was not *repeat* was not based on the cause of action upon which the case was brought to the District Court by Petitioner.

2. Memorandum and Order dated New York, 4-17-2007, accurately states the cause of action and allegations in the complaint, upon same was brought to the District Court. *See* this memorandum and order for affirmation; same, in the Petition for Writ of Certiorari.

3. Memorandum and Order dated New York, 4-17-2007, and Memorandum and Order dated New York, 11-19-2007, date filed 11-21-2007, are allegedly signed by the same judge, the Presiding Judge Naomi Reice Buchwald. That being the case, why then are the causes of action upon which the case was brought to the District Court different?

4. These too are grounds or reasons for allowance of the Petition for a Rehearing.

STATEMENT

The Court of Appeals for the Second Circuit affirmed the Judgment of the District Court in a Summary Order dated and filed on 6-5-2009. The Court ruled that "the district court did not abuse its

discretion in granting the extension" when "the district court granted Appellees a brief extension of time to file a motion to dismiss after Appellees had difficulty reaching Greene to arrange for a pre-motion conference." Second Circuit, "review a district court's grant of an extension of time pursuant to Fed.R.Civ.P. 6(b) for abuse of discretion." *See Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers,* 415 F.3d 279, 283-84 (2dCir.2005).

The Second Circuit relied upon the above-mentioned case law ("*Sanozky*"), to support its rulings. "The District Court did not abuse its discretion in granting the extension."

Petitioner researched *Sanozky* and found Second Circuit rulings, same, as follows: "Fed.R.Civ.P. 6(b) (District Court may, in its *284 discretion, grant an extension of time to perform an act *under the rules*").

Respondents' pre-motion conference, submitted to the District Court in a memo endorsed letter, dated 4-26-2007, hand delivered to the presiding judge's chambers on 4-27-2007, same, "defendants would like to move the Court for an Order dismissing the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 9(b)." "In addition, we respectfully request the Court to extend Defendants' time to respond to the Complaint to a date set by the Court at the requested conference."

Petitioner respectfully asks this Court whether Respondents' pre-motion conference, submitted to the

District Court in a memo endorsed letter dated 4-26-2007, "so ordered" 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required," qualified as being a Rule under 6(b)? IF NOT, then, the Court must conclude that this is reason for allowance of the Petition for a Rehearing.

STATEMENT OF THE CASE

1. On 3-13-2007, Petitioner filed an amended complaint with the District Court's Pro Se Clerk. The clerk, issued four summons, same were to be served upon each of the four Defendants. After having been served, Petitioner was required to return the originals with a certificate of service to the clerk's office. On 3-14-2007, Defendants were properly served, and, on 3-15-2007, the certificates of service were filed with the clerk's office.

2. The District Court, made it crystal clear to the Defendants on the face of the summons, what the consequences would be if Defendants failed to answer the complaint *prior* to expiration of time set forth on the face of the summons.

3. At midnight, on 4-3-2007, Defendants fell into default. When the court learned that the Defendants had not answered the amended complaint prior to expiration of time set forth on face of summons, the court breached its promise, did an about face, and, with jet like speed, illegally extended time to Defendants to answer or otherwise move. The

extension *was illegal* because neither Defendants nor the court were in compliance with Fed.R.Civ.P. 6(b), and the applicable Rules thereunder, 6(b)(1), 6(b)(2). Fed.R.Civ.P. 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period.

4. Fed.R.Civ.P. 6(b)(2), permits enlargement, *upon motion*, after the specified period expires. The applicant must show cause and excusable neglect.

5. Defendants, tardy litigants, have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion in this case a pre-motion conference, Show Cause and Excusable Neglect, same, pursuant to provisions provided for in Fed.R.Civ.P. 6(b)(2). Instead Defendants' pre-motion conference was pursuant to Fed.R.Civ.P. 12(b)(6), and 9(b).

6. Petitioner, contends that the District Court, *abused* its discretion when it extended time to Defendants to answer or otherwise move. Knowingly, that defendants, tardy litigants, have failed to answer an amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to move the court pursuant to Fed.R.Civ.P. 6(b).

7. Defendants, in a memo endorsed letter dated 4-26-2007, hand delivered to the judge's chambers on 4-27-2007, requested an extension of time to answer the

complaint. The court, on 4-30-2007, "so ordered" that "the defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required."

8. Petitioner, contends that the granted extension of time, mentioned herein above in #6, *was an abuse of discretion* and, a violation of Fed.R.Civ.P. 6(b) and 6(b)(2).

9. Petitioner brought the herein-captioned case to the District Court (S.D.N.Y.) on allegations that allege Defendants engaged in a fraudulent scheme to defraud its shareholders by allegedly, knowingly, and intentionally conspiring to manipulate Hanover Direct, Inc. (HDI) annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers' yearend bonuses for those that held performance contractual agreements, expressed or implied.

REASONS FOR ALLOWANCE OF A REHEARING

1. Memorandum and Order dated New York 11-19-2007, date filed 11-21-2007 same, granted Defendants' Motion to Dismiss the Complaint in its entirety with prejudice, was not *repeat*, was not based on the Cause of Action upon which the case was brought to the District Court by Petitioner.

2. The District Court, committed reversible error and abused its discretion when it extended time to

Defendants upon a request for same, in a pre-motion conference memo endorsed letter dated 4-26-2007, "so ordered," dated 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." Knowingly, that Fed.R.Civ.P. 6(b)(2), governs extension of time to a tardy litigant who has failed to answer the amended complaint *prior* to expiration of time period set forth on face of amended summons by the court.

A. RULE 6(b)(2) PERMITS ENLARGEMENT *UPON MOTION. SEE* CIVIL PROCEDURE RELEASE #9, 12/89. App. 1-4.

1. Rule 6(b)(2) permits enlargement, *upon motion*, after the specified period expires. The applicant must show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *See* App. 3, Rule 6(b)(2).

B. OTHER COURTS HAVE BEEN LESS DISPOSED TO GRANT RELIEF TO A TARDY LITIGANT.

1. *Other courts* have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2dCir.1974), *aff'd* 59 F.R.D. 512 (S.D.N.Y.1973). *See* App. 3, Rule 6(b)(2).

2. The Petition for a Rehearing should be allowed on the grounds that the case law upon which the Second

Circuit relied in its affirmation of the District Court's extension of time to Defendants, (*Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279 (2dCir.2005)), actually supports Petitioner's position; that the District Court and the Defendants, *were not in compliance with the rules under Fed.R.Civ.P. 6(b)*, namely 6(b)(1), 6(b)(2).

In *Sanozky*, the Second Circuit ruled as follows: "Fed.R.Civ.P. 6(b) (District Court may, in its *284 discretion, grant an extension of time to perform an act under *the rules*"). What are the applicable rules in the herein-captioned case? They are Rules 6(b)(1) and 6(b)(2). Did Defendants submit their pre-motion conference, under the provisions set forth in Rule 6(b)(2) Show Cause and Excusable Neglect? *The answer is no.* The District Court extended time to the Defendants to answer the amended complaint, *under grounds other than the provisions provided for under Fed.R.Civ.P. 6(b)(2).* Petitioner contends that the absence of pre-motion conference, by the Defendants, pursuant to the provisions provided for in Rule 6(b)(2); the District Court, the presiding judge, *does not have legal authority to extend time to Defendants* to answer the *amended complaint*.

3. Defendants, tardy litigants, have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion, in this case a pre-motion conference, to Show Cause and Excusable Neglect. If the District Court, the presiding judge, finds that the Show Cause was a good Show Cause for not answering the amended complaint prior

to expiration of time set forth on the face of the amended summons, and, that the excusable neglect was reasonable, absent of bad faith on the part of movant (Defendants), or undue prejudice to parties to the action *and most of all, that it was no fault of the Defendants, as to why the amended complaint was not answered prior to expiration of time period set forth on face of amended summons.* As it stands, Defendants did not file its pre-motion conference pursuant to Rule 6(b)(2), instead, Defendants' pre-motion conference was pursuant to Fed.R.Civ.P. 12(b)(6), 9(b).

4. The District Court, "so ordered" 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." Petitioner contends that this extension of time was contrary to the provisions provided for in Fed.R.Civ.P. 6(b)(2). Therefore, *an abuse of judicial discretion. See Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2dCir.1974), *aff'd* 59 F.R.D. 512, 513-15 (S.D.N.Y.1973). *Also see* App. 3, Rule 6(b)(2).

5. *The Petition for a Rehearing should be allowed, when this Court, applies facts given herein, to the law.*

6. *Further,* as far back as 5-11-2007, eleven days after District Court extended time to Defendants, in a "so ordered" ruling dated 4-30-07, Petitioner filed an application with the court respectfully requesting that the court reconsider its extension of time to Defendants to answer the amended complaint. *See* as follows:

1. Request for district court, to reconsider its extension of time to defendants to answer amended complaint on grounds that defendants were not in compliance with Fed.R.Civ. P.6(b)(2), application denied.

7. To conclude -1- under reasons for allowance of the Petition for a Rehearing, Petitioner contends that the illegal extension of time to Defendants, by the District Court, and the affirmation of same by Second Circuit, resulted in Petitioner being prejudiced, deprived of the relief sought in the amended complaint. -2- Fed.R.Civ.P. 55(b)(2), (default), and -3- The District Court's promise on the face of the amended summons, "An answer to the complaint which is herewith served upon you, within *20* days after service of this summons upon you exclusive of the day of service. *If you fail to do so judgment by default will be taken against you for the relief, demanded in the complaint.*"

8. The Second Circuit committed reversible error when it affirmed District Court's extension of time to Defendants to answer or otherwise move.

C. *SANOZKY* COMPELLINGLY SUPPORTS PETITIONER'S POSITION, AND NOT THE SECOND CIRCUIT'S.

1. Petitioner finds that *Sanozky*, compellingly supports Petitioner's position. That the Defendants failed to seek extension *under the Rules of 6(b), which are Fed.R.Civ.P. 6(b)(1), 6(b)(2).* Therefore, the Petition

for a Rehearing should be allowed. Petitioner is simply respectfully asking this Court to apply the facts given hereinabove, to the *law. Re: 6(b), and the applicable Rules thereunder, 6(b)(1), 6(b)(2).*

D. RULE 6(b)(1) GRANTS A COURT DISCRETION TO ENLARGE A TIME PERIOD FOR CAUSE SHOWN IF THE REQUEST COMES BEFORE THE EXPIRATION OF THE INITIAL PERIOD OR AN EXTENSION OF THAT PERIOD.

1. Had Defendants sought from Petitioner a stipulation for an extension of time to answer the amended complaint *prior to expiration of time period set forth on the face of the amended summons, same would have been granted.* However, had Petitioner refused the request for extension, Defendants could have sought the extension with request for same via affidavit to the District Court.

2. Rule 6(b)(1) grants a court discretion to enlarge a time period *for Cause Shown* if the request comes *before* the expiration of the initial period or extension of that period. *See* App. 1-4 for affirm. Defendants did not seek from the court, an extension of time to answer the complaint until 4-27-2007. Defendants were properly served on *3-14-2007.* And at midnight, on *4-3-2007, fell into default.* Thereafter, they were required to comply with the provisions provided for in Rule 6(b)(2) Show Cause and Excusable Neglect. Instead of making its pre-motion conference as provided for in 6(b)(2), Defendants pre-motion conference

was made in a memo endorsed letter dated 4-26-2007, hand delivered to judge's chambers on 4-27-2007. Same, to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b). Defendants said to the court: "We respectfully request the court extend Defendants' time to respond to the complaint to a date set by the court at the requested conference."

3. The Court acquiesced in a "so ordered" ruling dated 4-30-07. "Defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." *This was without a doubt, an abuse of discretion.* Petitioner contends that Second Circuit committed reversible error when it affirmed the District Court's extension of time to answer the amended complaint.

4. Petitioner visited the District Court's Pro Se Clerk on 4-16-2007, same, to find out whether Defendants had answered the amended complaint. The answer was no. Petitioner alleges that the Clerk's Office tipped off Defendants that they were in default. Hence, the Defendants' letter dated 4-17-2007 seeking stipulation for extension of time to answer the amended complaint. Same, referred to by Second Circuit, in its Summary Judgment, p.2 lines 38-42, as follows: "The district court granted appellees a brief extension of time to file a motion to dismiss after appellees had difficulty reaching Greene to arrange for a pre-motion conference." "The district court did not abuse its discretion in granting the extension." Petitioner contends that as brief as the extension may have been, same, must be granted

under Fed.R.Civ.P 6(b). The applicable Rules are 6(b)(1), 6(b)(2). Therefore, since the brief extension mentioned herein above, was not *repeat* was not under *the rules*, the District Court did indeed abuse its discretion in granting the extension. *See Sanozky.*

5. To conclude Number Two under Reasons for Allowance of the Petition for a Rehearing, Petitioner respectfully asks this Court whether Respondents' pre-motion conference, submitted to the District Court in memo endorsed letter dated 4-26-2007, "so order" 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required," *qualified as being a Rule under 6(b)*? If not, then *this Court must conclude that this is indeed a compelling reason to allow the Petition for a Rehearing.*

6. Petitioner, further, concludes that after Defendants failed to answer the amended complaint prior to expiration of time set forth on the face of the amended summons, Petitioner has no say in the matter of granting Defendants stipulation extending time to answer the amended complaint. It is left entirely up to the presiding judge and the provisions provided for in Fed.R.Civ.P. 6(b)(2). The Defendants, tardy litigants, should have filed their pre-motion conference Show Cause and Excusable Neglect, and if the Court finds that the Cause Shown was a good cause, and, the Excusable Neglect, demonstrated good faith by Defendants, also, *that there was a reasonable basis for not complying within the specified period set forth on the face of the amended*

summons, then, and only then that the District Court, the presiding judge, has the legal authority to extend time to Defendants to answer the complaint. Petitioner had no hand in the matter of the extension. So why were Defendants trying to reach Petitioner to arrange for a pre-motion conference? *See* p.2 lines 34-42 of Summary Order filed 5-5-2009. *Petitioner contends that the District Court did indeed abuse its discretion in granting the extension.* And, the case law that Second Circuit relied upon in its affirmation of the District Court's rulings *actually supported Plaintiff, the Petitioner.*

COMPELLING REASONS FOR ALLOWANCE OF THE PETITION FOR A REHEARING

1. Rehearing is warranted to resolve a conflict concerning the District Court's Memorandum and Order dated 4-17-2007, and Memorandum and Order dated 11-19-2007, and filed 11-21-2007. Re: Grounds upon which the case was brought to the Court.

2. Rehearing is warranted to determine which of the two Memorandum and Order the court should have based its final order, dismissing the complaint.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

CLIFF GREENE, *Pro Se*
1333 President Street
Brooklyn, New York 11213
(718) 493-7028

CERTIFICATION OF COUNSEL

I hereby certify that the foregoing petition is restricted to the grounds specified in Rule 44 and is presented in good faith and not for delay.

_____

Cliff Greene

Rule 6

Time

CIVIL PROCEDURE **Rule 6**

C. Wright & A. Miller, Federal Practice and Procedure: Civil XXX-III-LXVII (1987). There is current disagreement on the issue of the applicability of Rule 6(a) to federal statutes of limitation. Compare *Lawson v. Conyers, Chrysler, Plymouth & Dodge Trucks, Inc.*, 600 F.2d 465, 466 & n.1 (5th Cir. 1979) ("This court has consistently used Rule 6(a)'s method for computing federal statutory time limitations.") [and] *Wirtz v. Peninsula Shipbuilders Ass'n*, 382 F.2d 237, 238-40 (4th Cir. 1967) with *Joint Council Dining Car Employees, Local 370 v. Delaware, L. & W. R.R.*, 157 F.2d 417, 420 (2d Cir. 1946) ("Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action. . . . It is not intended to modify and change existing statutes of limitation."). Because of the Supreme Court's recent decision in *Walker v. Armco Steel Corp.*, 100 S.Ct. 1978 (1980), any argument seems foreclosed for the application of Rule 6(a) to a state statute of limitations in a federal diversity state claim action. State methods of computing state statute of limitations time periods must be followed by the federal court. See *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 581 (9th Cir. 1981) ("Computation of time provisions, like the commencement of action provisions involved in *Ragan* and *Armco Steel*, are 'an integral part of the statute of limitations.' The computation of time

provisions reflect a strong policy in favor of recognition of certain state holidays on specified days. As a result, we find that *Ragan* and *Armco Steel* require the district court to use the state rather than the federal computation of time statute.").

The 1985 amendment to Rule 6(a), effective August 1, 1985, makes the following changes: (1) If the last day of the time period is a day when the clerk's office is inaccessible because of weather conditions or other events, then that last day is excluded from the time period computation; (2) In place of the former period of less than 7 days, intermediate Saturdays, Sundays, and legal holidays are excluded from the time computation when the period allowed for response is less than *11* days; (3) The Birthday of Martin Luther King, Jr. (the third Monday of January) is now a legal holiday that must be acknowledged in the computation of time periods governed by Rule 6(a).

Rule 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period. Although this subdivision does not require notice to an opponent, local court rules may reflect a reluctance to enlarge without a noticed motion. E.g., "The court may, in its discretion, grant an initial extension *ex parte* upon the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why such stipulation cannot be obtained and the reasons why the extension is necessary." E.D. Cal. R. 142(b)

(1989). The meaning of "cause shown" is without significant case definition. See generally *Poe v. Cristina Copper Mines, Inc.*, 15 F.R.D. 85, 86-88 (D. Del. 1953).

Rule 6(b)(2) permits enlargement, upon motion, after the specified period expires. The applicant must show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *United States v. Miller Bros. Constr. Co.*, 505 F.2d 1031, 1035 (10th Cir. 1974) ("A discretionary extension should be liberally granted absent a showing of bad faith on the part of the movant . . . or undue prejudice to other parties. . . ."). *Coady v. Aguadilla Terminal, Inc.*, 456 F.2d 677, 678-79 (1st Cir. 1972). *Anderson v. Stanco Sports Library, Inc.*, 52 F.R.D. 108, 109-110 (D.S.C. 1971). Other courts have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974), *aff'g* 59 F.R.D. 512, 513-15 (S.D.N.Y. 1973). *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915-16 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 904 (1965). *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 474-75 (E.D.Pa. 1959). Regardless of this apparent difference in approach to Rule 6(b)(2), the outcome probably depends most on the type of proceeding not timely met.

Excepted from enlargement discretion in Rule 6(b), are the times for taking action under Rules 50(b), 52(b), 59(b),(d), and (e), and 60(b). This exception is strictly construed. See, e.g., *Hulson v. Atchison, T. & S. F. Ry.*, 289 F.2d 726 (7th Cir. 1961), *cert. denied*,

368 U.S. 835 (1961). The 1983 amendment to Rule 6(b)(2) adds two additional Rules that are excepted from enlargement discretion: Rule 50(c)(2) and Rule 74(a).

Rule 6(c). In 1963, Congress enacted a law, Pub. L. No. 88-139, 77 Stat. 437 (codified at 28 U.S.C. § 138 (1976)) which ended the observance of district court formal terms. This law made Rule 6(c) irrelevant and it is rescinded, effective July 1, 1966.

Rule 6(d) applies to written and noticed motions. The motion and its notice must be served five days prior to hearing unless a Rule or the court otherwise provides for cause shown by *ex parte* application.